83-699

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

AMERICAN INDUSTRIES, LTD., a Nevada corporation
SAVAHAI INC., a Nevada corporation, and
ZACK C. MONROE, Petitioners,

-vs-

INTERMODAL CARGO SERVICES, INC., E.D. OSGOOD,
KEN RIDLEY, JOHN MADROSEN, FRED HIGA, GEORGE
CASSSELLA and JACK MASLANIAK, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an award of damages for breach of contract and fraud plus all of Plaintiffs' attorney fees, confirmed by the Court of Appeals because of both Petitioners "misleading business dealings" before suit and "evasive conduct at trial", is an exception to the "American Rule" not condoned by this Court nor followed by the other Courts of Appeals, where there was no statutory or contractual basis for award of fees Petitioners defense was partly successful, and raised legitimate questions of law and fact.

2. In a diversity and Federal securities case, where parol evidence is offered to show fraud in the procurement of a non-securities contract,

a. Whether evidence of a parol promise may be admitted which is inconsistent with the terms of the contract, under California law.

b. Whether the terms of the contract found to be procured by fraud may be considered irrelevant to the issue of its fraudulent procurement and to tort liability arising therefrom.

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The Petitioners, AMERICAN INDUSTRIES, LTD., a Nevada corporation, SAVAHAI, INC., a Nevada corporation and ZACK C. MONROE, respectfully Pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 17, 1983.

OPINION BELOW

The memorandum opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 17, 1983. A timely Petition for rehearing was denied on July 29, 1983, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether an award of damages for breach of contract and fraud plus all of Plaintiffs' attorney fees, confirmed by the Court of Appeals because of both Petitioners "misleading business dealings" before suit and "evasive conduct at trial", is an exception to the "American Rule" not condoned by this Court nor followed by the other Courts of Appeals, where there was no statutory or contractual basis for award of fees Petitioners

defense was partly successful, and raised legitimate questions of law and fact.

2. In a diversity and Federal securities case, where parol evidence is offered to show fraud in the procurement of a non-securities contract,

a. Whether evidence of a parol promise may be admitted which is inconsistent with the terms of the contract, under California law.

b. Whether the terms of the contract found to be procured by fraud may be considered irrelevant to the issue of its fraudulent procurement and to tort liability arising therefrom.

STATUTORY PROVISIONS INVOLVED

15 USC §78(j):

> "Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-"
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or

deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10(b)5:

"**Reg. §240.10b-5.** It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

"(a) to employ an device, scheme, or artifice to defraud,

"(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

15 USC §78r:

"**Sec. 18.** (a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which

statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees against either party litigant. [As amended by Act of May 27, 1936, 49 Stat. 1379.]

STATEMENT OF THE CASE

GENERAL BACKGROUND
The Parties

Petitioners are the President and Parent Company of a gold mining company, SAVAHAI, INC., also a Petitioner. Respondents are a company, and the stockholders and officers of that company, who privately purchased publicly traded stock of Petitioner AMERICAN INDUSTIRES, LTD. (the Parent).

The Deal

Respondents' company, Intermodel Cargo Service, invested $120,000 in a "Profit Sharing Agreement"[1] with International Trade Investments, Inc. (ITI). ITI had previously entered into an agreement with Petitioner SAVAHAI, INC. (the Subsidiary) to process and refine ore from Petitioner SAVAHAI's mining properties, and it was ITI's expected profits from this venture which were the subject of the Profit Sharing Agreement.

The Pleadings

Respondents filed suit basing jurisdiction upon diversity, (28USC §1332) violation of the Securities Act of 1933 (15 USC §77v) the Securities Exchange Act of 1934 (15 USC §78aa) federal question jurisdiction 28 USC §1331, and principles of pendent jurisdiction. Their original eight Claims for Relief included common-law

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1 The Court of Appeals decision either erroneously referred to the SAVAHAI-ITI agreements as "Profit Sharing Agreement" or misunderstood Petitioners' contention. The discrepancy was pointed out in the Petition for Rehearing which was denied.

fraud, intentional and negligent misrepresentation and concealment, violations of §10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) thereunder, §7(a)(1) and (3) of the Securities Act of 1933, §12(2) and 17(a)(2) of the Securities Act of 1933, §5 and 12(1) of the Securities Act of 1933, §§5401 and 25501 of the California Securities Law, and breach of contract (as assignee of ITI). On the day of trial Respondents amended their Complaint to plead a Claim for Relief under §18 of the Exchange Act of 1934, and dismissed the claims under §17 of Securities Act of 1933.

Petitioners counterclaimed and brought a third party complaint against ITI alleging breach of contract and fraud.

The District Court Judgment

The District Court found that Petitioners fraudulently induced Respondents to invest $120,000 with ITI, which funds were largly used to process ore from Petitioners' gold mine. Respondents purchased their stock in AMERICAN

INDUSTRIES, LTD. from ITI's President for $33,000 who purchased it, for a lower price, from a stockholder of AMERICAN INDUSTRIES, LTD. Respondents were awarded judgment on the basis of fraud and as assignee of ITI's contractural rights against SAVAHAI, for their $120,000 investment with ITI, their purchase price of $33,000 for the stock on the basis of the securities claims, and for $95,749.63 attorneys' fees representing their entire fees incurred to, and including, the end of the trial.

The District Court Findings

The fraud of Petitioners was based upon the oral statements or omissions of Petitioner MONROE, and written statements or omissions (some in SEC filings) of Petitioners to ITI and Osgood (President of Respondent ICS) and other testimony: (1) which indicated the presence of commercial quantities of gold in SAVAHAI, INC.'s mining properties and (2) that the Petitioners promised that SAVAHAI would produce 1,000 ounces of gold per month which ITI would market quickly enough so

that Respondents could "rollover" their investment monthly to meet the $100,000 per month ITI obligation to SAVAHAI.

The Court found Petitioners violated Rule 10(b)5, 17 CFR §240, 10(b)5; Sections 5 and 12 of the Securities Act of 1933, 15 USC §§77e and 1; Sections 15 and 18 of the Securities Act of 1934, 15 USC §8 o and r; Sections 25401, 25501, 25503 and 25110 of the California Corporation Code.

The Contract

The SAVAHAI-ITI agreement was contained in 5 writings between the parties: 3 formal corporate board ratified agreements, a letter agreement and a "Statement of Understanding" requiring ITI, for one year, to pay SAVAHAI $100,000 per month and process and refine SAVAHAI's ore in exchange for half of the profits from the sale of the ore. These documents were all executed over a 10 month period before $100,000 of Respondents' investment with ITI left Respondents' control. Petitioners contend that the written agreements clearly restricted SAVAHAI's obligations to providing only

as much ore as was necessary to produce 1,000 ounces of gold per month; that ITI bore the risk of the lack of sufficient gold in the ore to make the processing and refining (which was ITI's obligation) worthwhile. The District Court found SAVAHAI's obligation was to "assure" 1,000 ounces of gold per month. No gold was recovered, either during the 3 weeks of mining pursuant to the SAVAHAI-ITI agreement, nor during several additional months of mining at SAVAHAI's sole expense of over $300,000.

The Gold Mine

Petitioners were found to have displayed to ITI and Osgood assays showing high quantities of gold, the authenticity of which was not questioned, but were found to have failed to disclose assays showing little or no gold. Petitioners explained that, in hard rock mining, the assays showing little or no gold merely indicated that the assays were not taken on a vein and were, therefore, immaterial. The values shown on Petitioners' assays were confirmed by an assay

independently taken by the President of ITI, who had been given the opportunity to inspect and assay the properties.

Contract Rejected As Evidence

Both the District Court, in its findings, and the Court of Appeals in its memorandum decision, refused to consider Petitioners evidence that the written agreements with ITI spelled out that ITI, and not Petitioner, had the obligation of producing gold from the ore, that the risk of failure to produce commercial ore, contractually, lay upon ITI; and that ITI had an obligation to invest a total of 1.2 million dollars at the rate of $100,000 per month for one year, and breached that obligation after investing only $120,000 (of Respondents' money) Petitioners' counterclaims and third-party complaint against ITI were denied. These rulings were based upon the findings that the contract was procured by fraudulent promises, statements and omissions.

The Agency

The District Court found that Respondents were

unaware of one of the agreements that even more clearly spelled out ITI's obligations (the Statement of Understanding) and that Petitioners had acted fraudulently to prevent Respondents from knowing of this document. Petitioners relied upon the agency relationship between Respondents and the President of ITI, as evidenced by their contract (the Profit Sharing Agreement), and the agency between Respondents and a C.P.A. selected by them, who were both present at the signing of the supposedly concealed agreement. Petitioners offered the evidence of the written agreements to rebut evidence that Respondents justifiably relied upon Petitioners' statements and omissions and to prove the lack of Petitioners' scienter. This evidence was declared irrelevant by both the District Court and the Court of Appeals because it was contained in contracts which were found to have been induced by fraud.

Petitioners' Misconduct During Litigation

Petitioner MONROE was admonished once during the trial for providing what the Court considered

"evasive" answers on cross examination while giving straight-forward answers during direct examination. He claimed lapses of memory because of heart problems and medication. Petitioner MONROE's testimony as to the date of the execution of the "concealed" agreement, while consistent with the date on the agreement, was inconsistent with the testimony of the President of ITI and the C.P.A. who were present at its signing and who claimed that it had been back-dated. Petitioner MONROE's testimony regarding the date of filing a copy of the "concealed" agreement with the SEC was controverted by evidence in the form of a letter from the SEC in Washington that the agreement was not received at the time Petitioner said it was mailed. Neither of the dates were particularly crucial to Plaintiff or Respondents' cases, except as to Petitioner MONROE's credibility and fraudulent intent, since even the later date was 6 months before Respondents' funds were paid, on their instructions from a joint signature account by their C.P.A. and Petitioner MONROE for mining

and refining operations. No monetary sanctions were imposed during pretrial proceedings, except Respondents who did not appear at a status conference were dismissed and paid Petitioners' fee for the appearance. There was no finding that any of the motions or pleadings presented by Petitioners were frivolous or groundless, nor were they so criticized by the District Court.

The foregoing were the major incidents, save one, of what might be termed misconduct by Petitioners during the litigation of the case.

Finally, there was surprise testimony, unexpected by Petitioners who had not deposed the witness, that Petitioner MONROE and the witness had engaged in fraudulent conduct designed to mislead Petitioners' stockholders several months after Respondent had pulled out of the deal. This testimoney of substituting ore at the refinery was offered to prove that there was, in fact, no gold later recovered from the mining operation. It rebutted Petitioners' evidence that about 100 ounces of gold had been recovered during the

subsequent mining, processing and refining paid for by SAVAHAI. The witness offering this testimoney was also the person who received most of Respondents' money in the form of payment for processing the ore pursuant to a contract with ITI, as well as over three hundred thousand dollars from Petitioners and their stockholders. The District Court found the witness believable and Petitioner MONROE's testimoney unbelievable. Petitioners contended the failure to recover substantial quantities of gold was due to the witness's faulty processing equipment; and that they had been cheated. Nevertheless, Petitioners' mines were found to be "goldless".

Value of Stock

There was no direct evidence of the market value of the stock, or that Petitioners' filings with the SEC affected that market value or the price Respondents paid for the stock, but there was a finding that the stock was "valueless", which Respondents argued below was based upon the finding that Petitioners' gold mining claim (one

of several) was "goldless". During the trial AMERICAN INDUSTRIES, LTD. stock was traded on NASDAQ, yet no quotations of market value were offered. Return of the stock to Petitioners, or to the stockholder from whom it was purchased, or to ITI, was not ordered as part of the judgment.

REASONS FOR GRANTING THE WRIT

I

To the extent that the decision below holds that damages for fraud or 10(b)5 violations include an award of attorneys' fees for "fraudulent and misleading behavior in his business dealings with Plaintiffs" (Petitioners herein) the decision of the Ninth Circuit Court of Appeals is in conflict with the applicable decisions of the United States Supreme Court, and has sanctioned the departure from a long settled rule of American jurisprudence: attorney fees of the winner are not generally shifted to the loser in the absence of an agreement between the parties, or statutory authority. Arcambel vs. Wiseman, 1 US (3 Dall.) 306 (1796); Alyeska

Pipeline Services Co. vs. Wilderness Society, 421 US 240, 247, 95 SCt 1672, 1616; (1975); California Code of Civil Procedures §1021 (West 1955); D'Amico vs. Board of Medical Examiner, 11 Cal 3d 1, 520 P2d 10, 112 Cal Rptr 786 (1974).

There Is No Contractual Provision

Aside from the fact that there was no contractual agreement between Petitioners and Respondents (other than as ITI's assignee), there were no applicable provisions for attorneys' fees in the agreements into which both Petitioners and Respondents entered with ITI.

There Is No Express Statutory Authority

The only specific Federal statutory basis for fees advanced by Respondents was pursuant to §18 of the Exchange Act (18 USC 78r). While there was a specific finding of violation of §18 by the District Court, the affirmance by the Court of Appeals of the fee award was on grounds of "bad faith", citing: "Hall vs. Cole, 412 US 1, 5, 93 SCt 1943, 1946, 36 LEd 2d 702, 707 (1973); See F.D. Rich. Co., vs. Industrial Lumber Co., 417 US

116, 129-30, 94 SCt 2157, 2165, 40 LEd 2d 703, 714 (1974)".

Though the Findings and the Memorandum Opinion are silent, among the reasons for the failure of the District Court and the Court of Appeals to ground the award of attorney fees on §18 may be: there was no proof that any SEC filing affected the price of AMERICAN INDUSTRIES, LTD.'s securities (Cramer vs. General Telephone and Electronics, 443 FSupp 516 (ED Pa 1977, affirmed 582 F2d 254 (CA-3 1978) and the statute of limitations contained in §18(c) had run before the filing of the amended complaint on the day of trial, alleging the §18 violation, over objection from Petitioners. (Decker vs. Massey-Ferguson, Ltd., SD NY 1981, CCH Dec 1981, par. 98,026.) (10(b)5, Claim for Relief did not stop the statute of limitations from running on a later amended claim under §18.) See Ross vs. A.H. robbins, Inc. Co., 607 F2d 545 (CA-2 1978) cert den 446 US 945 (1980). The stock was purchased in early 1979. Trial commenced in September, 1981.

An award of attorney fees pursuant to §10(b) of the Securities Exchange Act of 1934, 15 USC §78j(b) and Rule 10(b)5 thereunder, is not permissable since it is punitive in nature and punitive damages are not authorized by that statute. Huddleston vs. Herman and MacLean, 640 F2d 534 (CA-5 1981), affirmed, reversed in part on other grounds; Herman and Mac Lean vs. Huddleston, __US____, 103 SCt 683, 74 LEd 2d 548 (1983). Van Allen vs. Dominick & Dominick, Inc., 560 F2d 547 (CA-2 1977); Affliated Ute Citizens of Utah vs. United States, 406 US 128, 155, 92 SCt 1456, 1473, 31 LEd 2d 741, 762 (1972).

None of the other Securities Law sections pleaded contain express or implied provisions for an award of attorneys' fees to a private litigant.

The "Bad Faith" Exception To The American Rule Followed By The Federal Courts

This judicial exception has not been settled by the California Courts. The footnote of the California Supreme Court in Serrano vs. Unruh, 32 Cal 3d 621, 186 Cal Rptr 754, 652 P2d 985 (19), succinctly explains the state of the law in that

state:

> "A fourth principal exception, for bad faith or 'vexatious and oppressive conduct' in conducting the lawsuit is recognized in Federal Courts (see e.g. Hutto vs. Finney, 437 US 678, 691; 98 SCt 2565, 2573, 57 LEd 2d 522). This Court chose not to consider the exception in D'Amico vs. Board of Medical Examiners, (1974) 11 Cal 3d 1, 26-27; 112 Cal Rptr 786, 520 P2d 10. (See also Baurgess vs. Paine, (1978) 22 Cal 3d 626, 150 Cal Rptr 461, 586 P2d 942 [fees may not be awarded as sanction under Court's supervisory authority]). Courts of Appeal are split on the question (Cf. County of Inyo vs. City of Los Angeles, (1978) 78 Cal App 3d 82, 91; 144 Cal Rptr 71 [assuming exception exists under Williams vs. MacDougall, (1870) 39 Cal 80, 85-86]; Young vs. Redman, (1976) 55 Cal App 3d 827, 838-839; 128 Cal Rptr 86, [California Courts without jurisdiction, absent statute, to award fees for bad faith])."

The United States Supreme Court has long recognized the "Bad Faith" exception. Alyeska Pipeline Service Co. vs. Wilderness Society, supra; Hall vs. Cole, supra.

However, Petitioner contends that this Court need not necessarily reach the question of whether the District Court should have applied whatever it perceived to be the California Rule regarding attorney fees (see Wright & Miller, Federal

Practice and Procedure, §4513, p215 (1982 ed); Alyeska Pipeline Serv. Co. vs. Wilderness Society, supra N.31; Michael Regan Co. vs. Lindell, 527 F2d 653, 656-659 [CA-9 1975]), since the bad faith exception was not applied in this case in accordance with any judicially defined version of the Federal rule or the California Rule (as expressed by any of its Appellate Courts).

The express reference by the decision below to Page 5 US 412, Page 1946, 93 SCt 1943, Page 707, 36 LEd 2d of Hall vs. Cole, supra, and the fact that all of Respondents' fees from before the inception of litigation were awarded would indicate that the Court of Appeals for the Ninth Circuit intended to affirm the award of fees upon the ground that Petitioners had maintained a defense "obstinately" without any color of right. See Vaughn vs. Atkinson, 369 US 527, 8 LEd 2d 88, 82 SCt 997, reh den 370 US 965, 8 LEd 2d 834, 82 SCt 1578.

However, the record which was before the Court of Appeals does not in any way support such

a conclusion.

In the first place, Respondents' prayer to the District Court included a request for 1.2 million dollars in punitive damages. These were not awarded.

Finally, encompassed by the question of whether Petitioners presented an "obstinate" defense is the second question presented by this Petition (p2, supra). If the District Court erred in interpreting the contract between SAVAHAI and ITI, or in refusing to consider it, or in admitting parol evidence which directly contradicted its terms, then, but for that error alone, Petitioners would have established, at least a credible defense, if not a victory. For this reason Petitioners briefly present their argument primarily to demonstrate to this Honorable Court the "color" of their defense.

The parol evidence rule is a matter of substantive law. Mueller vs. Hubbard Milling Co., 573 P2d 1029, 1035 (CA-8 1978); Merchants Nat'l Bank & Trust Co. vs. Proffessional Men's Assn., 409 F2d

600, 602-03 (CA-5 1969). Insofar as the claims which were based upon diversity and pendant jurisdiction, which include all but the Federal Securities Claims (specifically the Rule 10(b)5 claims) the District Court should have applied the California parol evidence rule. Wright & Miller, Federal Practice and Procedure, §2405; Baker vs. Rapport, 453 F2d 1141 (CA-1 1972).

That rule is stated and discussed in the dissent of Circuit Judge Kennedy in Bell vs. Exon Co., USA, 575 F2d 714 (CA-9 1978) at p. 716:

> "The opinion of the court correctly states that oral statements may be admitted to show fraudulent inducement to enter into a contract even when the contract recites that it is fully intergrated. To be admissible, however, the parol evidence offered must 'tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use, and not a promise directly at variance with the promise in writing.' 34 Cal Ju3d Fraud and Deceit §80, at 730 (1977). An oral promise which antedates a written contract is not admissible to prove fraud if it is 'in direct contravention of the unconditional promise' contained in the parties' written agreement. Bank of America National Trust & Savings Ass'n vs. Pendegrass, 4 Cal2d 258, 263, 49 P2d 659, 661 (1938);

accord, Simmons vs. California Institute of Technology, 34 Cal2d 264, 274, 209 P2d 581, 587 (1949) (en banc) cf. Masterson vs. Sine, 68 Cal2d 222, 65 Cal Rptr 545, 436 P2d 561 (1968) (en banc) (parol evidence admitted to prove existence of separate oral agreement as to any matter on which document is silent and which is not inconsistent with its terms). See generally Sweet, Promissory Fraud and the Parol Evidence Rule 49 Calif LRev 877 (1961).

"Simmons vs. California Institute of Technology, 34 Cal2d 264, 209 P2d 581 (1949) (en banc), does not support the conclusion that evidence of the alleged oral representations is admissible. That case expressly states that

> 'a distinction must be made between * * * a parol promise * * *, which **by its very nature is superseded by the final writing, inconsistent with it,** and a promise made with no intention of performing the same, **not inconsistent with the writing,** but which was the inducing cause thereof.'"

When the District Court considered, over objection, parol evidence to show that SAVAHAI had promised to ITI (and through it, Respondents) to deliver 1,000 ounces of gold per month rather than merely as much ore as ITI needed to produce that amount of gold, if ITI would refine it, either:

a. The Court erroneously admitted the evidence,

or

b. Erroneously interpreted the written contract to contain such a promise, thereby making the parol evidence consistent with its terms. (The findings indicate the latter.)

In either event, the contract was relevent evidence which should have been considered and not disregarded as irrelevant, as it was by both the District Court and the Court of Appeals, who should have examined the District Court's interpretation.

The District Court adopted a perversion of the parol evidence rule which was affirmed by the Court of Appeals: Parol evidence can be used to prove the fraudulent inducement of a contract, but a contract so induced cannot be used to rebut the evidence of fraud. Petitioners do not, here, necessarily argue that their contract should have been enforced, only that its provisions were relevant to questions of fact concerning the alleged fraudulent inducement and their tort liability. The District Court misconstrued the meaning of the contract and thereby misunderstood that evidence. The Court of Appeals refused to consider the

construction of the contract for purposes of evidence to rebut the fraudulent inducement. The Court of Appeals confirmed the District Court's findings that the contract was "of no effect" (Findings 15:1-3) and therefore its construction was "irrelevant" (Memorandum of Opinion, P1), since it was induced by fraud, Petitioners contended that the Statement of Understanding, found to be "of no effect" merely restated in different words the prior contractual documents, which were barely referred to in the Findings and Conclusions.

The Decision Below
Is A Departure From The American Rule

If the Court of Appeals did not affirm the award of fees on grounds sanctioned by Vaughan vs. Atkinson, supra, it is either in conflict with the holdings of other Courts of Appeal in awarding fees without limiting them to those expenses reasonably incurred to meet the other parties groundless, bad faith procedural moves (see discussion under 2 below) or it attempts to break new ground. Either case calls to this Honorable Court's supervision of the federal judiciary regarding a matter fundamental to American jurisprudence.

Since the Court of Appeals cited Petitioner's "fraudulent and misleading behavior in his business dealings with Plaintiffs" as a basis for the award, the conclusion is almost inescapable that the Court intended to approve punishment of conduct which occurred prior to the commencement of litigation. This conduct is the same tortious conduct that was compensated by an award of damages for fraud. Punitive damages were prayed for, but not awarded. Therefore, the Court of Appeals has created a new exception to the American rule, not followed by this Court or the other Courts of Appeals, namely, that attorneys' fees may be awarded as an item of damages in cases of fraud.

II

To the extent that the decision below permits the award of all of Plaintiffs' fees for "evasive conduct at trial" without a finding of the extra costs to Plaintiff of Petitioners evasive conduct, it is in conflict with the decisions of other Circuit Courts of Appeal.

Other Courts of Appeal limit the amount of attorneys' fees awarded for bad faith activities during

a law suit to an amount found to be incurred by the other party in dealing with groundless, bad faith procedural moves. Browning Debenture Holders Committee vs. Dasa Corp., 560 F2d 1078, 1089 (CA-2 1977); In re Boston & Providence R.R. Corp., 501 F2d 545, 550 (1st CA-1974). Also see Monk vs. Roadway Express, Inc., 559 F2d 1378 (CA-5 1979), denying attorney fees assessed pursuant to 28 USC §1927.

For the reasons expressed above, it is conjectural that the Court of Appeals in this case based its affirmance of the District Court's award upon "evasive conduct" at trial. It found the award not "excessive" despite the fact it was based upon all of the expenses incurred in the lengthy preparation and trial of the case. However, there were no findings segregating the Respondents' cost for Petitioner MONROE's evasive conduct; further, the award was assessed against all of the Petitioners, jointly and severally. As a sanction it should have been personal. Hall vs. Cole, supra. As such, the award should have been against MONROE only. Browning Debenture Holders Committee vs. Dasa Corp., supra.

III

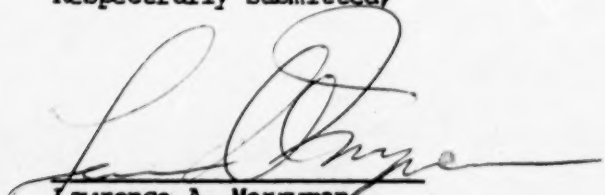
The express sanction by the Court of Appeals of treating a contract as irrelevant evidence for the purpose of determining questions of fraud in the inducement of that contract is a rule of evidence without support in the Federal judicial system and requires the examination of this Honorable Court. For the reasons heretofore presented, it should not stand.

CONCLUSION

For these reasons, a Writ of Certiorari should be issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

DATED: October 25, 1983

Respectfully submitted,



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SAVAHAI, INC. and
ZACK C. MONROE

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERMODAL CARGO SERVICES, INC. E .D. OSGOOD, KEN RIDLEY, JOHN MADROSEN, FRED HIGA, GEORGE CASSELLA and JACK MASLANIAK Plaintiffs-Counterdefendants-Third-Party-Defendants Appellees, vs. AMERICAN INDUSTRIES, LTD., a Nevada corporation, SAVAHAI, INC., a Nevada corporation and ZACK C. MONROE, Defendants/Counterclaimants-Third-Party-Plaintiffs Appellants.	No. 82-4009 D.C.No. 79-3812 MEMORANDUM

Appeal from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding
Argued and submitted, April 13, 1983

Before: WISDOM*, Senior Circuit Judge, and SCHROEDER and BOOCHEVER, Circuit Judges.

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*Honorable John Minor Wisdom, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

The defendants' contention that the district court erred in its construction of the profit sharing agreement is irrelevant. Regardless of the terms contained in the resulting agreement, if a contract has been fraudulently induced, the defrauded party may recover for any damages he has suffered as a result of the fraud. Cal. Civ. Code. §§ 1709, 1711 (West 1973). We hold that the district court did not err in its finding that Monroe fraudulently induced Circiello to enter into the Savahai Agreement and Osgood to enter into the Profit Sharing Agreement. Fed. R. Civ. P. 52(a). Osgood is therefore entitled to recover the $120,000 paid out pursuant to the Profit Sharing Agreement

We also hold that the district court did not err in its finding that Monroe and American Industries (A.I.) made material misstatements and omissions of fact in connection with the sale of A.I. stock in violation of 15 U.S.C. §78(j) and Rule 10b-5, 17 C. F. R. 240.10b-5 (1983). The evidence, viewed in the light most favorable to

the plaintiffs, supports the conclusion that Monroe misrepresented the economic prospects of and the past production from the gold mine and failed to mention unfavorable assays relating to the mine. The defendants have cited no cases sugesting that the trial court erred in its interpretation and application of Rule 10b-5. The record also contains sufficient evidence to support the trial court's finding that the A.I. stock was valueless. As a result, the plaintiffs are entitled to recover the sums paid to purchase A.I. stock. See Foster v. Financial Technology, Inc., 517 F.2d 1068, 1071 (9th Cir. 1975).

Finally, we cannot agree with the defendants that the trial court erred in awarding the plaintiffs' $95,000 in attorneys' fees. "[I]t is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted...'in bad faith, vexatiously, wantonly, or for oppressive reasons'." Hall v. Cole, 412 U.S. 1, 5, 93 S. Ct. 1943, 1946, 36 L. Ed. 2d 702, 707 (1973); see F.D. Rich Co. v.

Industrial Lumber Co., 417 U.S. 116, 129-30, 94 S. Ct. 2157, 2165, 40 L. Ed. 2d 703, 714 (1974). Monroe's fraudulent and misleading behaviour in his business dealings with the plaintiffs and his evasive conduct at trial inexorably lead to the conclusion that he acted in bad faith. Furthermore, we find that the $95,000 awarded in this case is not excessive.

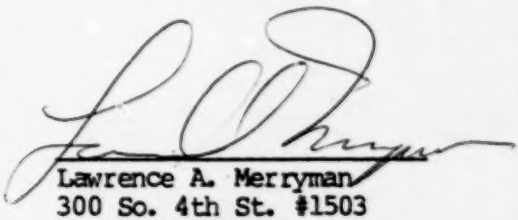
The judgment is AFFIRMED.

CERTIFICATE OF SERVICE

State of Nevada)
) ss.
County of Clark)

I hereby certify that on this 25th day of October, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Martin Quinn, ROGERS, JOSEPH, O'DONNELL & QUINN, 505 Sansome Street, 14th Floor, San Francisco, California 94111, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Executed on October 25, 1983 at Las Vegas, Nevada.



Lawrence A. Merryman
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Las Vegas, NV 89101
Attorney for Petitioners

IN THE UNITED STATES DICTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERMODAL CARGO SERVICES, INC.) E .D. OSGOOD, KEN RIDLEY, JOHN) MADROSEN, FRED HIGA, GEORGE) CASSELLA and JACK MASLANIAK)) Plaintiffs-Counterdefendants,)) v.)) AMERICAN INDUSTRIES, LTD., a) Nevada corporation, SAVAHAI,) INC., a Nevada corporation and) ZACK C. MONROE,) NO. C-79-3812 SW) Defendants/Counterclaimants.)	
AMERICAN INDUSTRIES, LTD., a) Nevada corporation, SAVAHAI,) INC., a Nevada corporation,)) Third Party Plaintiffs,)) v.)) INTERNATIONAL TRADE INVESTMENTS) INC., and FRANCESCO CIRCIELLO,)) Third Party Defendants.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

General Findings

This is the case of the goldless gold mine.

In order to make this very complicated factual situation more understandable, the various participants will be referred to in descriptive role terms (e.g., Mr. Brad Stratton, a stock broker who played a role in putting the subject deal together will be referred to as "Broker"). Also, whenever used, descriptions of actions taken by participants are intended to decribe the actions of the then various corporations they represented as well, (e.g., Francesco Circiello is designated "Seeker". He is president of International Trade Investments [ITI]. The designation "Seeker" is intented to describe activities of Circiello as well as ITI).

The principal characters in this cast are:

Zack C. Monroe (Owner) who is president of American Industries (AI) and Secretary-Treasurer

of Savahai (Savahai) a wholly owned subsidiary of AI, and alleged possessors of title to the gold mines in question.

Brad Stratton (Broker) a stock broker and commodities dealer from Los Angeles.

Francesco Circiello (Seeker) who was president of a closely-held, under-financed California corporation known as International Trade Investments (ITI).

E. D. Osgood (Investor) who was president and chief executive officer of Intermodal Cargo Services, Inc. (ICS) and several other waterfront operations.

George (sic) White (Grinder) who processed all the rock from the mine that was supposed to, but did not, yield gold.

Babcock (CPA) who knew both Seeker and a friend of Investor and had a part in bringing Seeker and Investor together.

A bare bones account of what happened is as follows:

Broker heard of a plan by Owner to mine, process and sell gold on a "cash and carry" basis. Essentially, for a monthly advance, Owner would supply large quantities of ore to be processed and marketed by the "cash and carrier". The profits were to be split on an equal basis.

Broker encouraged Seeker's interest in this project, and after some preliminary investigation Seeker entered into a cash and carry agreement with Owner. The agreement called for a $100,000 per month advance by Seeker (which he did not have) plus a $20,000 good faith deposit (which he also did not have). It also happened to assure Seeker the production of 1000 ounces of gold per month. (See Nov. 30 letter, Plaintiffs' Exhibit No. 28).

Seeker and Broker agreed to share certain benefits of the agreement. The agreement also

gave Seeker an option to purchase substantial quantities of stock in AI.

Several days after he entered into the agreement with Owner, Seeker was introduced to Investor by CPA.

Investor was impressed with the profit potential of the Seeker-Owner agreement, put up the $20,000 good faith money, and after several months of intensive investigation, advanced the $100,000. In both instances he placed the money in a common account so that it could not be spent without his concurrence (through the signature of CPA).

After a number of months delay, Grinder was engaged to set up his operation at the mine site and start processing ore.

During this same time, and as parallel matter, Investor exercised Seeker's option to purchase stock in AI. The AI stock had been issued to friends of Owner (James Brugman and

Helmut H. Lihs) for a small down payment and a substantial promissory note. These friends had sold substantial amounts of this stock throughout the United States and applied a portion of the proceeds from these sales to the promissory notes. When Investor told Owner he wanted to exercise the option, Brugman was the person who actually contacted Investor and sold him a portion of his stock for $33,000.

But back to Grinder. Two months and $75,000 of grinding rock failed to produce any gold. Investor made a trip to the mine, became convinced that there was no gold or potential for gold in that operation and directed Seeker to claim breach of contract. Thereafter Seeker assigned his rights in the agreement to Investor who brought suit under the Securities Act of 1933 (15 U.S.C. 78), diversity (28 U.S.C. 1332) and pendent jurisdiction (Fraud). Owner counterclaimed and brought a third party complaint against Seeker

alleging breach of contract and fraud.

The matter proceeded to court trial and was submitted to the court for decision on September 30, 1981.

During the course of the trial numerous conflicts arose in the testimony of the various witnesses. After hearing the testimony, and observing the manner and demeanor of the witnesses the court determined that the testimony of Owner was to be viewed with extreme caution. He professed loss of memory in many particulars, and in those areas where he claimed knowledge, the contrary testimony of other witnesses, e.g., Seeker and CPA (as to the date of the execution of the memorandum of understanding (Defendants' Exhibit No. 5) and Grinder (as to whether the gold poured at Carson City, Nevada came from Savahai's mines or was placer gold from Northern California) was the much more believable, and was accepted by the court as true.

Additional Findings

In August of 1978 Broker went to Las Vegas at Seeker's request to secure more details as to the operation. He visited Savahai's mines with Owner. Owner told Broker that Savahai was in production at the rate of 30 tons per day, that the ore being extracted averaged 2.4 ounces of gold per ton and that Savahai had already stock-piled a considerable quantity of gold-rich ore "on the other side of the mountain." There was, however, no such volume or quality of ore produced and there was no such ore stockpile as Owner described.

In answer to Broker's questions, Owner produced assays of Savahai gold ore which ranged up to six ounces per ton of gold; no assays showing low amounts of gold were produced, though a number of these were available to Owner. Owner also explained to Broker that there was an opportunity to reap large profits in AI stock.

Based on what Owner told him, and on the documents showed him, Broker prepared a report for Seeker. That report described AI's corporate condition and Savahai's gold. It overstated AI's assets and operating capital as well as its prospects for the sale of stock. The report also contained this critical false statement about Savahai's mining operation:

> "Current production and assay: approximately 30 tons per day, stockpiled, assay reports show 2.4 oz per ton, varying upward and downward."

Owner read and apparently approved this report; in any event, he did not correct any part if it in his discussions with Seeker.

Sometime before August 26, 1978, Seeker received and read Broker's report.

On August 26, 1978, Broker returned to Las Vegas with Seeker and they spent the day with Owner, who reconfirmed the misstatements contained in Broker's report.

Owner also showed Seeker two misleading Savahai memoranda concerning the mines, as well as other misleading geological reports and assays. Owner told Seeker there would be opportunities to profit in AI stock.

Seeker believed both Broker's report and Owner's representations to be the truth and in reliance thereon, decided to enter into a contract for Savahai's gold.

Owner assured Seeker that no more than $100,000 would be required to fund the Savahai Agreement, since once Seeker had 1,000 ounces of gold in hand it could sell that gold, or borrow against it, and thus "roll over" the first month's production to acquire the second month's $100,000 "advance".

At the first meeting between Seeker and Investor, in September 1978, Investor listened to -- and believed — Seeker's report of his meeting with Owner. Seeker also gave Investor the report

prepared by Broker and various other AI and Savahai documents which Seeker had received from Owner. Investor relied on these documents and what Seeker told him in concluding that Savahai was already stockpiling sufficient ore of 1-2.4 ounces-per-ton quality to meet its commitment of 1,000 ounces of gold each month.

In September or October 1978, Owner introduced Seeker to Brugman. Owner and Seeker negotiated the terms of an option for Seeker to buy 50,000 shares of AI stock for $2 per share from Brugman's company. Later Brugman got Owner's permission to offer Seeker this option.

A similar option was offered to Seeker in a letter from Lihs on the same date. At that time, Seeker had not met Lihs, but negotiated the entire transaction with Owner.

Owner know that Seeker did not intend to purchase the stock for investment, but intended to resell it.

In October 1978, with Owner's knowledge, Seeker bought 500 shares of AI stock from Brugman and Lihs for $500.

In a letter to Investor of October 27, 1978 Seeker again spelled out the Savahai Agreement as he understood it. With this letter, Seeker enclosed AI's 8-K Report dated October 6, 1978.

Owner had every reason to know from his own assays and other information that statements in the report were grossly exaggerated or untrue; in fact, AI's 8-K Report was the subject of adverse comments to that effect from the SEC on at least two occasions in November and December of 1978. Investor, however, believed the statements contained in AI's 8-K to be true.

In November 1978, Investor met Owner in San Francisco. During that meeting, Owner was made fully aware that Investor was a potential investor and a possible source of Seeker's initial $100,000 monthly advance. Owner spoke enthusiastically

about Savahai's prospects for producing gold in January 1979 and encouraged Investor to go through with the deal.

At their November meeting, Owner also encouraged Investor to buy AI stock, which Owner said he could obtain at a favorable price.

In reliance on the November 30th letter and other assurances, Investor entered into an agreement with Seeker (the "Profit-Sharing Agreement") whereby Investor agreed to make two loans to Seeker, one for $20,000 and another for $100,000 with the proceeds to be used to fund the Savahai Agreement. In return Investor received two promissory notes in those amounts, plus a one-half interest in Seeker's share of its profits under the Savahai Agreement, if any. Investor was also to receive half the benefits of Seeker's options to purchase AI stock.

On December 20, 1978, with the knowledge of Owner, Investor purchased 1,500 shares of legended

AI stock for $3,000 from Seeker which had purchased the shares from Brugman's company. This purchase was consummated in California and the stock was finally transferred to Investor by Owner and certificates were mailed in June 1979.

Between December 21st and Christmas 1978 and after ICS' $20,000 "good faith" money had been delivered first to Seeker and then to Savahai, Owner, CPA and Seeker met in Owner's office. During that meeting, Owner explained to CPA and Seeker that there would be a tax advantage to Seeker if he were to sign a "Statement of Understanding", prepared by Owner, which document contained language to the effect that Seeker was required to make all of its 12 monthly advances of $100,000 to Savahai, whether or not any gold was ever produced. Seeker's $1.2 million was to be "at risk" and Seeker was to have "no recourse" if no ore containing gold was delivered. To obtain Seeker's signature, Owner reassured him that the

Statement of Understanding was solely for tax purposes and would not play a part in the Seeker-Savahai contractual arrangement, which arrangement was to remain unchanged.

Owner's "tax-advantage" story was untrue. His true intent, which he failed to disclose to Seeker and CPA, was to use the Statement of Understanding in an attempt to falsely persuade the SEC that Savahai had a $1.2 million risk-capital commitment from Seeker "whether or not mineral deposits are uncovered." Owner's further intent was to hold the Statement of Understanding against the day when Seeker or Investor might protest the absence of gold forthcoming under the Savahai Agreement. Nevertheless, Seeker believed Owner's story and, in reliance thereon, signed the Statement of Understanding.

Owner caused the Statement of Understanding to be dated September 5, 1978 although it was prepared and signed in late December. A copy of

the document was then enclosed with a January 19, 1979 letter from Owner to the SEC, which letter misrepresented Seeker's commitment to Savahai.

Investor remained unaware of the Statement of Understanding until December 1979, just prior to the filing of this action.

Although the Statement of Understanding was and is ineffective to vary or modify the terms of the Savahai Agreement, Owner's failure to disclose its existence to potential investors, including Investor, constituted a material omission or misrepresentation, since the Statement of Understanding clearly indicated Savahai's lack of capacity and intent to perform the apparent terms of its only contract for the production of gold. Not only did Owner not directly inform Investor of the Statement of Understanding, but also AI's SEC filings failed to disclose the existence of this document on at least three separate occasions: AI's 10-Q's of December 31, 1978, March 31, 1979

and June 30, 1979. Investor read, believed and relied upon all but the last of these reports, each of which contained this material omission, before he caused Investor to purchase 10,000 shares of AI stock in June 1979.

When Grinder negotiated with Owner, he expressed reluctance to enter into this agreement: His own investigations and assays of Savahai's ore materials had revealed that there was no commercially mineable ore on Savahai's claims; Grinder thus concluded that Savahai could not pay B&W out of the fruits of its mining operation. Owner, however, told Grinder that no gold production was required: Savahai's operation was, according to Owner, a Savahai "tax shelter" of some sort; Grinder was to conduct open-pit explorations only. After checking on the financial resources available to Investor, which company had been identified to Grinder as the major investor funding the "tax shelter"

exploration program, he agreed to begin operations and did so on or about June 22, 1979.

Investor's purchases of stock were for the various individual plaintiffs as follows:

E.D. Osgood	4,000 shares	$12,000
Ken Ridley	2,000 shares	6,000
John Madrosen	1,000 shares	3,000
Fred Higa	1,000 shares	3,000
George Cassella	1,000 shares	3,000
Jack Maslaniak	1,000 shares	3,000
Total	10,000 shares	$30,000

With respect to stock purchases, the term investor shall be deemed to include each of the above.

Between May and July 1979, approximately $74,000 was paid from the Common Account against invoices submitted by Grinder and approved by Savahai and Owner.

In July 1979, Investor, accompanied by Seeker and CPA, visited the Savahai Gold mine, where Investor discovered from Grinder the truth about

Savahai's mining operation: No commercially viable ore had been located or extracted, no gold or concentrate had been or was being produced, and no substantial amount of materials containing more than a few hundreths of an ounce of gold per ton was known to exist.

In November of 1979, Owner caused the removal of CPA as signatory on the Common Account. Subsequently, Savahai withdrew substantially all of the remaining balance of approximately $26,000 in the Common Account which it used to pay Grinder.

In August 1979, Owner invited James Brugman and Rudiger Pflaumbaum to a ceremonial "pour" at a refinery in Carson City, Nevada of eleven or more ounces of gold which Owner indicated had come from the Savahai mines. Pflaumbaum was, through Brugman, a substantial investor in AI. In fact, the gold poured was Placer gold from Northern California, which gold Owner had arranged to buy

from Grinder and for which he made payment by authorizing phantom B&W billings to Savahai in an amount equal to the value of the gold.

Investor has suffered damages in the amount of $120,000, plus interest thereon, on account of its loans to Seeker, the proceeds of which were in turn advanced by Seeker to Owner pursuant to the Savahai Agreement.

The Investor's 11,500 shares of AI stock has a non-existent market value. Investor thus has been damages in the amount of $33,000, plus interest thereon, on account of his purchase of AI securities.

Owner and AI participated in, and were substantial factors in bringing about Investor's purchases of AI stock from Seeker and Seeker's purchases from Brugman.

In making all the misrepresentations and omissions referred to herein, Owner in some instances intended to defraud Seeker and Investor,

and in all cases acted with reckless disregard of the truth.

Investor was justified in relying on the truth and completeness of the information provided to them directly by Owner or passed on by Owner.

In making oral and written representations to Seeker concerning Savahai mines and AI stock, Owner know or should have known that Seeker would pass this information on to Investor or other prospective investors in Seeker or purchasers of gold. In making representation in documents filed with the SEC, Owner know or should have known that members of the public, including plaintiffs, would rely on them.

Conclusions of Law

In connection with the purchase by plaintiffs of 11,500 shares of AI stock, Owner made material untrue statements and omitted to state material facts.

These facts and omissions were such that a

reasonable person would rely upon them in making an investment decision about the purchase of AI securities.

A number of these material facts and omissions were contained in public documents which Owner caused to be filed with the SEC.

Owner had a duty to disclose material facts to plaintiffs in connections with the purchase of securities in view of Owner's access to relevant information and the reliance which plaintiffs, who had no such access, were placing on them.

Owner (acting on behalf of the defendant companies) knew that statements they made or caused their companies to make were untrue or were at least reckless in failing to ascertain whether they were true.

Owner also knew that prospective purchasers of AI securities in general, and plaintiffs in particular, would justifiably rely upon their statements and omissions. The plaintiffs in this

action did rely upon Owner's statements and omissions in purchasing AI stock at the prices paid.

In making these untrue statements and omissions, Owner acted with the intent to deceive prospective purchasers of AI stock in general and plaintiffs in particular.

Taken as a whole, the Owner's actions constituted deceptive practics and a course of business which operated as an intentional fraud upon plaintiffs.

Plaintiffs were damaged by Owner's misrepresentations and omissions in that the AI stock they acquired at up to $3 per share was then and is now of little or now value.

Owner and AI knew of and actively and materially participated in the sales of stock to plaintiffs.

Owner and AI offered AI stock to plaintiffs in California and AI knew of and benefitted from

the sales by Brugman to ITI and ITI to plaintiffs in that AI indirectly received part of the proceeds from Brugman.

Such sales were made in part by oral and written communications which contained untrue material facts and omitted to state material facts.

Plaintiffs did not know of the untruths and omission and in the exercise of reasonable care could not have known of them.

Owner made use of the mails and facilities of interstate commerce to offer, sell and transmit the securities to plaintiffs.

No registration in accordance with the Securities Act of 1933 was in effect for the securities sold to plaintiffs and no prospectus complying with the Act was provided to plaintiffs.

By virtue of the distribution scheme adopted by Owner, by which AI stock was sold to large numbers of unsophisticated purchasers by James

Brugman and H. H. Lihs, who acted as underwriters within the meaning of the Securities Act of 1933, and by which said stock was then resold with the knowledge and participation of Owner to others, AI was not entitled to an exemption from registration or from the requirement to provide a prospectus.

AI and Owner offered and participated in the sale of securities in California which were not qualified and were not exempted from qualification.

Plaintiffs purchased AI stock in reliance, in part, on false statements made by AI in documents filed with the SEC. Owner participated in the making of such statements. Plaintiffs did not know any of the statements were false.

As a result of the conduct described in the foregoing findings of fact and conclusions of law, Owner has violated Rule 106-5 (sic), 17 C.F.R. §240, 106-5 (sic); Sections 5 and 12 of the Securities Act of 1933, 15 U.S.C. §77e and 1;

Sections 15 and 18 of the Securities Act of 1934, 15 U.S.C. §78 o and r; Sections 25401, 25501, 25503 and 25110 of the California Corporations Code.

Owner's fraudulent acts and misrepresentations induced Seeker to enter into the Savahai Agreement and induced Investor to enter into the Profit Sharing Agreement with Seeker.

The Statement of Understanding was of no effect since it was obtained by Owner after the fact and through fraud.

Investor suffered damages in the amount of $120,000 plus interest thereon as a result of Owner's fraudulent representations which induced Seeker to enter into its agreement with Savahai.

Seeker validly assigned to Investor its right against Savahai to the extent of $120,000 plus interest thereon.

Neither Investor, Seeker, nor any of the counterdefendants or third party defendants is

liable to counterclaimants for any sum whatsoever.

AI and Owner are liable to Investor (ICS) in the sum of $3,000 and to Investor (Osgood) and the other individual plaintiffs in the sume of $30,000 plus interest thereon.

Defendants are liable for plaintiffs' resonable costs and attorneys' fees in the amount of $95,749.63.

IT IS SO ORDERED.

DATED: December 3, 1982

_____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DICTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERMODAL CARGO SERVICES, INC.) E .D. OSGOOD, KEN RIDLEY, JOHN) MADROSEN, FRED HIGA, GEORGE) CASSELLA and JACK MASLANIAK)) Plaintiffs-Counterdefendants,)) v.)) AMERICAN INDUSTRIES, LTD., a) Nevada corporation, SAVAHAI,) INC., a Nevada corporation and) ZACK C. MONROE,) NO. C-79-3812 SW) Derendants/Counterclaimants.)	
AMERICAN INDUSTRIES, LTD., a) Nevada corporation, SAVAHAI,) INC., a Nevada corporation,)) Third Party Plaintiffs,)) v.)) INTERNATIONAL TRADE INVESTMENTS) INC., and FRANCESCO CIRCIELLO,)) Third Party Defendants.)	

JUDGMENT

IT IS HEREBY ORDERED that Judgment be entered in the above-captioned matter for the plaintiffs against the the defendants American Industries, Ltd., Savahai, Inc. and Zack C. Monroe, who are jointly and severally liable as follows:

To intermodal Cargo Services, Inc. ("ICS"):

$20,000 plus 7% interest thereon from 11/30/78.....$ 24,223.02

$100,000 plus 7% interest thereon from 12/29/78.....120,558.86

$3,000 plus 7% interest thereon from 12/20/78.....3,622.02

Total.....$148,403.90

To ICS and E. D. Osgood: $12,000 plus 7% interest thereon from 6/18/79.....$14,073.30

To ICS and Ken Ridley: $6,000 plus 7% interest thereon from 6/18/79.....$7,036.65

//

To ICS and John Madrosen: $3,000 plus 7% interest thereon from 6/18/79.....$3,518.32

To ICE and Fred Higa: $3,000 plus 7% interest thereon from 6/18/79.....$3,518.32

To ICE and George Cassella: $3,000 plus 7% interest thereon from 6/18/79.....$3,518.32

To ICE and Jack Maslaniak: $3,000 plus 7% interest thereon from 6/18/79.....$3,518.32

To ICS and all individual plaintiffs: Costs and reasonable attorneys' fees.....$95,749.63

IT IS FURTHER ORDERED that Counterclaimants take nothing.

DATED: December 7, 1981

UNITED STATES DISTRICT JUDGE

LAWRENCE A. MERRYMAN, ESQ.
Valley Bank Plaza Suite 1503
300 South Fourth Street
Las Vegas, Nevada 89101-6077
Telephone: (702) 386-2633

Attorney for Defendants, Counterclaimants
and Third Party Plaintiffs

IN THE UNITED STATES DICTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERMODAL CARGO SERVICES, INC.) E .D. OSGOOD, KEN RIDLEY, JOHN) MADROSEN, FRED HIGA, GEORGE) CASSELLA and JACK MASLANIAK) Plaintiffs-Counterdefendants,) v.) AMERICAN INDUSTRIES, LTD., a) Nevada corporation, SAVAHAI,) INC., a Nevada corporation and) ZACK C. MONROE,) Defendants/Counterclaimants.)	NO. C-79-3812 SW NOTICE OF APPEAL
AMERICAN INDUSTRIES, LTD., a) Nevada corporation, SAVAHAI,) INC., a Nevada corporation,) Third Party Plaintiffs,)	

v.)
)
INTERNATIONAL TRADE INVESTMENTS)
INC., and FRANCESCO CIRCIELLO,)
)
Third Party Defendants.)
)

NOTICE IS HEREBY GIVEN that AMERICAN INDUSTRIES, LTD., a Nevada corporation, SAVAHAI, INC., a Nevada corporation and ZACK C. MONROE, Defendants, Counterclaimants and Third Party Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on December 8, 1981.

DATED: December 29, 1981

LAWRENCE A. MERRYMAN, ESQ.
Attorney for Defendants, Counter-
Claimants and Third Party Plaintiffs

F I L E D

JUL 29 1983
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERMODAL CARGO SERVICES, INC. E.D. OSGOOD, KEN RIDLEY, JOHN MADROSEN, FRED HIGA, GEORGE CASSELLA and JACK MASLANIAK,	No. 82-4009 D.C. # 79-3812 (Northern District of California)
Plaintiffs/Counterdefendants-Third-Party-Defendants-Appellees,	
-vs-	ORDER
AMERICAN INDUSTRIES, LTD., a Nevada corporation, SAVAHAI, INC. a Nevada corporation and ZACK C. MONROE,	
Defendants/Counterclaimants-Third-Party-Plaintiffs-Appellants.	

Before: WISDOM.* SCHROEDER and BOOCHEVER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing.

*Honorable John Minor Wisdom, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

CERTIFICATE OF SERVICE

State of Nevada)
) ss.
County of Clark)

I hereby certify that on this 25th day of October, 1983, three copies of the Petition for Writ of Certiorari and Appendix were mailed, postage prepaid, to Martin Quinn, ROGERS, JOSEPH, O'DONNELL & QUINN, 505 Sansome Street, 14th Floor, San Francisco, California 94111, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Executed on October 25th, 1983 at Las Vegas, Nevada.

Lawrence A. Merryman
300 So. 4th St. #1503
Las Vegas, NV 89101
Attorney for Petitioners

CORRECTION

Decker vs. Massey-Ferguson, Ltd., SD NY 1981, erroniously cited on Page 18 of the Petition as "CCH Dec 1981, par. 98,026", is correctly cited as Commerce Clearing House Securities Reporter, CCH Dec 1981, par. 98,026.

No. 83-699

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN INDUSTRIES, LTD., a Nevada corporation,
SAVAHAI, INC., a Nevada corporation, and
ZACK C. MONROE,

Petitioners,

—vs.—

INTERMODAL CARGO SERVICES, INC., E.D. OSGOOD,
KEN RIDLEY, JOHN MADROSEN, FRED HIGA,
GEORGE CASSELLA and JACK MASLANIAK,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION OF RESPONDENTS

ROGERS, JOSEPH, O'DONNELL
& QUINN
MARTIN QUINN
WILLIAM B. CHAPMAN
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505 Sansome Street
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(415) 956-2828

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether an award of attorneys' fees based on petitioners' conduct in this case may be justified under the "bad faith exception" to the so-called "American rule," and/or Section 18 of the Securities Exchange Act of 1934.

2. Whether, under the facts of this case, California's parol evidence rule required the exclusion of evidence showing that respondents were fraudulently induced to enter into certain contracts.

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OPINIONS BELOW

The Court of Appeals issued its Memorandum Opinion on June 17, 1983. This opinion appears on pages 1-4 of the Appendix to the Petition for Writ of Certiorari already filed in this Court. The district court did not issue an opinion. Its Findings of Fact and Conclusions of Law are also appended to petitioners' papers.

JURISDICTION

Judgment was entered by the Court of Appeals on June 17, 1983, and a petition for rehearing was denied on July 29, 1983. A Petition for Writ of Certiorari was then timely filed in this Court, which has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 18(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78r:

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(Emphasis added.)

STATEMENT OF THE CASE

A. Procedural Background.

This case was brought in the United States District Court for the Northern District of California pursuant to federal subject matter jurisdiction under 28 U.S.C. §1331 to litigate issues arising under Section 22 of the Securities Act of 1933, 15 U.S.C. §77v, Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, and principles of pendent jurisdiction.

The district court found that petitioners made material untrue statements and failed to state material facts in connection with the purchase by respondents of certain shares of stock. [Findings of Fact and Conclusions of Law ("Findings") 12:17-19]. As a result of this and other findings relating to the conduct of

petitioners, the district court found that petitioners had violated Rule 10b-5, 17 CFR §240.10b-5; Sections 5 and 12 of the Securities Act of 1933, 15 U.S.C. §§77e and 1; Sections 15 and 18 of the Securities Exchange Act of 1934, 15 U.S.C. §§78o and r; and Sections 25401, 25501, 25503, and 25110 of the California Corporations Code. [Findings 14:20-26].

The district court also found that petitioners' fraudulent acts and misrepresentations had induced respondents to enter into one or more agreements, that these agreements were of no effect, and that respondents had been defrauded of the payments made to petitioners under these agreements. [Findings 14:27-15:7]. For these acts, the district court held petitioners liable for $153,000 plus interest and, based on conduct which will be described below, also awarded attorneys' fees to respondents in the amount of $95,749.63.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the trial court in all particulars. With reference to the questions presented here, the Ninth Circuit upheld the district court's finding that the agreements at issue had been fraudulently induced, and that respondents, Intermodal Cargo Services, Inc., E.D. Osgood, Ken Ridley, John Madrosen, Fred Higa, George Cassella and Jack Maslaniak (hereafter referred to individually or collectively as "Osgood"), the defrauded parties, should recover their damages. [Memorandum Opinion, page 2].

The Ninth Circuit also held that the trial court did not err in awarding attorneys' fees based on petitioner's "fraudulent and misleading behavior in his business dealings with the plaintiffs and his evasive conduct at trial." [Memorandum Opinion, page 4].

B. Factual Background.

Petitioners American Industries, Ltd., Savahai, Inc., and Zack C. Monroe (hereafter referred to individually or collectively as "Monroe") owned mines in Arizona and California. Monroe met Osgood through Francesco Circiello, President of International Trade Investments, Inc. (hereafter referred to individually or collectively as "Circiello"), and by a series of misrepresentations induced Osgood to invest in the "production of 1,000 ounces of gold per month" from Monroe's mines. [Findings 3:3-10]. In reliance upon Monroe's representations, Osgood advanced money to Monroe (through Circiello) which was supposed to pay Monroe's expenses in mining and refining the gold. In return, Osgood was to get a substantial share of the profits to be gained from this production of gold. [Findings 6:8-10; 7:20-8:6]. Also in reliance upon the

misrepresentations of Monroe, Osgood purchased 33,000 shares of American Industries stock at about three dollars a share. [Findings 13:14-16].

Monroe's mine produced no gold. [Findings 11:1-5]. The stock purchased by Osgood had no value. [Findings 13:14-16]. Osgood brought the action below to recover its investments in Monroe's fraudulent scheme, and both the trial court and the appellate court allowed that recovery.

Throughout the litigation, Monroe sought to obstruct its progress. His behavior during discovery and at trial was calculated to and did disrupt and delay the proceedings. For one example, Monroe failed at trial to produce the original of a key (and fraudulent) document, which had earlier been identified at a deposition. This, despite Monroe's promise on the stand to produce the document. [Reporter's Transcript ("RT") 179:23-180:19, 61:14-22,

342:17-343:4]. For another example, Monroe feigned memory loss at deposition* and at trial, whenever it served his purposes. [RT 1003:24-1004:3, e.g.].

As a result, the trial judge found Monroe to be evasive and unbelievable, and determined that his testimony "was to be viewed with extreme caution." [Findings 4:19-31]. Monroe was undaunted in his deceptions and remained intransigent throughout the litigation. For such behavior the courts below allowed recovery of Osgood's attorneys fees.

*Monroe also failed without notice to attend his first deposition and interfered frequently in the depositions of others.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Questions Which Warrant Further Review.

Respondents have restated the compound and confusing questions presented by petitioners in an effort to clarify the issues before the Court. No matter how the questions are phrased, however, they do not raise questions of general significance but instead present questions of fact of the sort the Court typically declines to address. As the Court said in United States v. Johnston, 268 U.S. 220, 227, (1925): "We do not grant a certiorari to review evidence and discuss specific facts." That is precisely what petitioners here are asking the Court to do.

A. No Federal Question Is Presented.

Neither of the "questions" presented by petitioners raises a proper federal

question. The first, related to the award of attorneys' fees, amounts to a mere factual challenge of the basis in the record for the finding of bad faith below. The legal basis for the courts' decision, discussed more fully below, is firmly established.

The second "question" petitioners present does not involve a federal issue at all. California law determines the parol evidence issue in question. And, as the Court made plain in Huddleston v. Dwyer, 322 U.S. 232, 237 (1944): "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."

B. This Case Turns Entirely On Its Facts.

Petitioners themselves do not challenge the legal basis for the award of

attorneys' fees, because the law is clear. As is stated on page 20 of the Petition, "[t]he United States Supreme Court has long recognized the 'Bad Faith' exception." Where, as here, the only issue raised is as to the factual support in the record for the findings below, the Court has consistently held that it will not grant certiorari:

> [T]his Court ... cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949). This rule has "particular force" in situations where, as here, the credibility of witnesses based on their demeanor at trial plays a major role in the determinations of the trial court. Berenyi v. District Director, Immigration & Naturalization Service, 385 U.S. 630, 636 (1967).

C. This Case Has No Significance Beyond Its Monetary Impact On The Parties.

This case relates only to the parties involved in this particular controversy, and has no impact on other groups or individuals. There do not exist in this litigation any "'[s]pecial and important reasons' [which] imply a reach to a problem beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955)(cert. dismissed as improvidently granted). This case raises no novel issues of law which must be addressed by the Court because of their potential effect on other litigants.

II. The Award Of Attorneys' Fees Was Proper In This Case.

The Court of Appeals found that Monroe's "fraudulent and misleading behavior in his business dealings with the [respondents] and his evasive conduct at

trial inexorably lead to the conclusion that he acted in bad faith." [Memorandum Opinion, p. 4]. As the Court said in Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978):

> An equity court has the unquestioned power to award attorney's fees against a party who shows bad faith by delaying or disrupting the litigation....

Monroe's evasive and disruptive conduct prior to and during the trial amply support the finding that Monroe acted in bad faith in this case.

A. The Court of Appeals Correctly Interpreted The Court's Recent Decisions.

The seminal current case upholding the non-statutory award of attorneys' fees is Hall v. Cole, 412 U.S. 1 (1973). In Hall, the Court recognized an exception to the so-called "American rule," under which each party is normally held responsible for its own attorneys' fees. That exception allows

the award of attorneys' fees at the discretion of a federal court whenever a finding is made that an unsuccessful party has acted in bad faith.

Here, the Ninth Circuit explicitly relied on Hall, and cited the following passage in support of its decision to affirm the trial court's award of attorneys' fees:

> [I]t is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted ... 'in bad faith, vexatiously, wantonly, or for oppressive reasons'. [412 U.S. at 5].

[Memorandum Opinion, p. 4].

Both courts below made clear their belief that such an exercise of discretion was warranted by the record in this case, and the Ninth Circuit's opinion specifically states that its support of the award of attorneys' fees was based on the grounds set forth in Hall, and F.D. Rich Co. v. United States, Industrial Lumber Co. Inc.,

417 U.S. 116 (1974). Accord, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Hutto v. Finney, 437 U.S. 678 (1978).

Such an exercise of discretion is well within the powers of the trial court. See, e.g., Bell y. School Board, 321 F.2d 494, 500 (4th Cir. 1963) ("award of counsel fees lies within the sound discretion of the trial court"), Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473, 481 (4th Cir. 1951) (allowance of attorneys fees is matter resting in sound discretion of trial judges), cited with approval in Hall v. Cole, 412 U.S. at 5. As petitioners have put forward no persuasive argument to show that the district court abused its discretion, the award was properly affirmed by the Court of Appeals. See, e.g., Perichak v. Int'l Union of Elec. Radio, 715 F.2d 78 (3d Cir. 1983) (once a finding of

"bad faith" is made, party opposing fees must show decision to award fees exceeded reasonable exercise of discretion), Swanson v. American Consumer Industries, Inc., 517 F.2d 555 (7th Cir. 1975) ("abuse of discretion" is proper standard of review for award of attorneys' fees).

B. The Facts of This Case Justify Attorneys' Fees Under Either 15 U.S.C. §78r or the "Bad Faith Exception."

Although the Court of Appeals based its affirmance of the award of attorneys' fees on petitioners' bad faith, the district court's findings would also support the award on another basis: petitioners' violation of Section 18 of the Securities Exchange Act of 1934, 15 U.S.C. §78r.

Where Section 18 of the 1934 Act is violated, subsection (a) allows the court "in its discretion" to award reasonable attorneys' fees. As with their challenge

to the "bad faith exception," petitioners do not make any argument that Section 18 would not support such an award. Rather, they attempt to bring into question the factual validity of the district court's finding of a violation of Section 18.

It is unnecessary, however, to decide whether petitioners' violation of Section 18, is a separate basis for the award of attorneys' fees in this case, or whether case law has merged such statutory grounds with the "bad faith exception." This is so because the courts below were clearly correct in their application of the "bad faith exception" in this case.

As the cases have repeatedly made clear, attorneys' fees may be awarded in the absence of any express statutory authority whenever "bad faith" is found before or during the litigation. Petitioners have sought to obscure this rule by erroneously or intentionally citing, at

page 28, only the Circuit Court decision in Monk v. Roadway Express, Inc., 599 F.2d 1378 (5th Cir. 1979), aff'd in part and remanded sub nom Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). According to petitioners, the Fifth Circuit reversed an award of attorneys' fees in a case arising under 28 U.S.C. §1927 for lack of statutory authority. But what petitioners failed or omitted to note was that in Roadway Express, Inc. v. Piper, the Court granted a writ of certiorari, affirmed with respect to the lack of statutory grounds, and then went on to point out that federal courts had the inherent power to award attorneys' fees whenever the losing party has acted in bad faith. As the Court in Roadway Express, Inc. v. Piper said:

> The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. "'[B]ad faith' may be found, not only in the actions that led to

> the lawsuit, but also in the conduct of the litigation."

457 U.S. at 766. Thus, the Court remanded to allow the district court to make a "specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers." Id. at 767.

C. This Case Raises No Conflict Among the Circuits.

On page 26 of the Petition, petitioners state that, "[i]f the Court of Appeals did not affirm the award of fees on grounds sanctioned by Vaughan v. Atkinson [369 U.S. 527, (1962)] it is either in conflict with the holdings of other Courts of Appeal ... or it attempts to break new ground."

It is clear from the Memorandum Opinion that the Ninth Circuit did rely on grounds sanctioned by Vaughan and other

Supreme Court cases, and that its opinion is in complete harmony with those decisions. In Vaughan, the Court stated that the allowance of counsel fees is "part of the historic equity jurisdiction of the federal courts," and is not limited to express statutory authorization. 369 U.S. at 530. And the reasoning in Vaughan, relating to the discretion of the lower courts, is the same as that later set forth in Hall v. Cole, 412 U.S. 1, upon which the Court of Appeals relied. Thus, no aspect of the decision below "attempts to break new ground."

There is also no substantial conflict among the Circuits with regard to the award of attorneys' fees. Hall and Vaughan have been followed by those courts which have directly addressed the matter. See, e.g., Perichak v. Int'l Union of Elec. Radio, 715 F.2d 78 (3d Cir. 1983)(fees may be awarded in the trial court's discretion "when the

interests of justice so require"); McCandless v. Great Atlantic & Pacific Tea Co., Inc., 697 F.2d 198 (7th Cir. 1983) (followed Hall); Nemeroff v. Abelson, 704 F.2d 652 (2d Cir. 1983)(fees awarded for litigation where action was maintained in bad faith); Cornwall v. Robinson, 654 F.2d 685 (10th Cir. 1981)(fees awarded for bad faith and "vexatiousness"); Lipsig v. National Student Marketing Corp., 663 F.2d 178 (DC Cir. 1980)(fees awarded for dilatory tactics in discovery and at trial).

While not every case has used exactly the same verbal formulation in determining whether or not to award attorneys' fees under the "bad faith exception," there is no conflict in the principle that egregious conduct is proscribed. Within this principle, the determination of whether "bad faith" is present is a factual one and depends on the circumstances of each case.

This is not the kind of "conflict" which warrants review by this court.

D. Petitioners' Contention that the Bad Faith Found Below was Based on the Assertion of a Frivolous Defense is Erroneous.

Petitioners are wrong in their assertion that the Court of Appeals based its affirmance of the trial court's decision on a finding that petitioners put forward their defense without color of right. There is no suggestion of this in the record, which contains instead numerous references to petitioners' bad faith.

And, of course, the assertion of a colorable claim or defense does not negate the possibility of bad faith. As the District of Columbia Circuit Court of Appeals stated:

> [B]ad faith "does not require that the legal and factual bases for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy or mala

> fides, the assertion of a colorable claim will not bar the assessment of attorneys' fees against him."

Lipsig v. National Student Marketing Corp., 663 F.2d 178, 182 (DC Cir. 1980). It was precisely this kind of bad faith which the courts below found here. Whether petitioners' defense was "colorable" is, therefore, irrelevant.

III. The California Parol Evidence Rule Does Not Exclude Evidence of Fraud.

The District Court found that Osgood was fraudulently induced by Monroe to enter into a contract which required it (through Circiello) to advance $100,000 per month, plus a $20,000 good faith deposit, in exchange for a (false) promise by Monroe to produce 1,000 ounces of gold per month. [Findings 3:3-10.] The parol evidence rule does not apply to this situation.

The California Parol Evidence Rule has been codified in Code of Civil Procedure

Section 1856. Subsections (f) and (g) of Section 1856 state as follows:

> (f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue.
>
> (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.

Petitioners cite no cases calling into question the validity of this language, because there are none. Where, as here, the evidence sought to be introduced is evidence dealing with the validity or fraudulent inducement of an agreement, it will be admitted. Here, Osgood's evidence showed that Monroe knowingly made fraudulent misrepresentations about his "gold-rich" ore, about certain gold assays, and about the actual production of the mine

just prior to the agreements. The Osgood-Monroe agreements were made on the basis of these misrepresentations. This was evidence of "a promise made with no intention of performing the same, not inconsistent with the writing, but which was the inducing cause thereof." Simmons v. Cal. Institute of Technology, 34 Cal.2d 264, 274 (1949). Such misrepresentations, said the trial court, constituted fraud. Petitioners' reliance on the parol evidence rule is misplaced: the courts below correctly applied California law to the facts before them.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit should be denied.

Dated: December 29, 1983

MARTIN QUINN
WILLIAM B. CHAPMAN
BARBARA L. HULBURT
ROGERS, JOSEPH, O'DONNELL
& QUINN

Attorneys for Respondents

CERTIFICATE OF SERVICE

State of California)
) ss
County of San Francisco)

I hereby certify that on this 4th day of January, 1984, three copies of the Opposition of Respondents were mailed, postage prepaid, to Lawrence A. Merryman, 300 So. 4th Street, #1503, Las Vegas, Nevada 89101, Counsel for the petitioners. I further certify that all parties required to be served have been served.

Executed on January 4th, 1984 at San Francisco, California.

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& Quinn
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(415) 956 2828

Attorneys for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-699

AMERICAN INDUSTRIES, LTD., a Nevada corporation
SAVAHAI INC., a Nevada corporation, and
ZACK C. MONROE, Petitioners,

-vs-

INTERMODAL CARGO SERVICES, INC., E.D. OSGOOD,
KEN RIDLEY, JOHN MADROSEN, FRED HIGA, GEORGE
CASSSELLA and JACK MASLANIAK, Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY OF PETITIONERS

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I

REPLY TO STATEMENT OF THE CASE

A. Misstatement of Evidence of Misconduct.

The reference in Respondents' Opposition ("Rs. Op.") to MONROE's failure to attend a deposition and "feigned loss of memory" at a deposition (Rs. Op. p8) were not introduced into evidence or proven. Similarly, there was no evidence of MONROE "frequently interfering in the depositions of others" (Rs. Op. p8). The Findings and Conclusions are silent regarding misconduct, except as to characterize MONROE's testimony as "...to be viewed with extreme caution" and less believable than other witnesses (Findings, p7 of Petition Appendix). Respondents' characterizations of MONROE's conduct as "calculated to disrupt and delay proceedings", "intransigent", "undaunted in his deceptions" (Rs. Op. p7, 8) are unsupported by the Findings and are but an example of the baseless invective which has obscured, rather than enlightened, issues in the Courts below.

Significance Of The Misstatement Of Evidence Presented

The award of all of Respondents' fees amounting to over $95,000 could not possibly be compensatory for the procedural misconduct set forth in the Petition. Furthermore, the District Court did not even consider these additional allegations of misconduct set forth in Respondents' Opposition Brief in making its award. Yet, the record is clear that Respondents' entire legal bill, from pretrial negotiations to the end of trial, was submitted and awarded, to the penny. This is a clear abuse of discretion if it is grounded only upon the procedural misconduct, if any, which was referred to in the District Court's findings.

B. Misstatement of Finding of Bad Faith.

Respondents' Opposition misstates the District Court's findings:

> "Monroe's evasive and disruptive conduct prior to and during the trial amply support the findings that Monroe acted in bad faith in this case" (Rs. Op. p13)

In fact, the Findings of Fact and Conclusions of Law never use the words "bad faith", nor even

what might be argued to be their equivalent, except in describing the tortious conduct for which damages were awarded (see Findings Appendix to Petition).

Significance Of Misstatement Of Findings

As confirmed by the quote in Respondents' Opposition, federal courts have held, "a finding (of bad faith) would have to precede any sanction under the court's inherent powers" (Rs. Op. p19) quoting Monk vs. Roadway Express, Inc., 559 F2d 1378 (5th Cir. 1979), aff'd in part and remanded sub nom Roadway Express, Inc. vs. Piper, 447 US 752 at 767 (1980).

C. Misstatement Of Contract.

Respondents' statement, on page 6 of their Opposition, misstates a crucial matter:

> "In reliance upon MONROE's representations, OSGOOD advanced money to MONROE (through CIRCIELLO) which was supposed to pay MONROE's expenses in mining and refining the gold. (Emphasis added.)

In fact, the contractual language which has been ignored or misstated by Respondents and the District Court throughout the case, is as follows:

1. "Savahai will assure a sufficient quantity of ore (but not limited to such) extracted from its mines to be shipped to a selected smelter of ITI's choice in order to assure an orderly production of the above mentioned quantity of gold. ITI will establish controls to assure the refining process to international standards, complete extraction from the ore shipment, establish safeguards and protect the by-products." (Emphasis added.) Savahai/ITI Agreement of August 26, 1978 (Exhibit "1" to the Complaint.)

2. "Savahai will produce enough smelting ore and ore concentrate for a minimum of 1,000 ounces of gold each and every month as the contractual obligation." (Emphasis added.) Letter from Savahai to Babcock ("CPA" for Respondents) dated November 11, 1978 (Exhibit "2" to the Complaint.)

3. "The August 26, 1978 agreement, approved by ITI Board of Directors on September 5, 1978, was entered into by and between ITI and SAVAHAI, whereby ITI pays SAVAHAI, ONE MILLION TWO HUNDRED TWENTY THOUSAND DOLLARS..... ($1,220,000.00) minimum risk capital for the purpose of exploring and developing mines owned by SAVAHAI, to produce commercial ore as set out in the agreement.

"THEREFORE, ITI understands and acknowledges that the payment to SAVAHAI is at risk and ITI has no recourse to SAVAHAI or AMERICAN INDUSTRIES, LTD., should the exploring and developing fail to produce commercial ore according to the contract." Statement of Understanding, dated September 5, 1978 but found to be actually executed in December, 1978. (Exhibit "B" to Answer, Counterclaim and Third Party Complaint.)

4. In a three-way agreement between Petitioners, ITI and B & W (who contracted to process, smelter and "arrange for a finished product of gold"), dated May 25, 1979, the August 26, 1978 agreement was referred to, and

> "B & W acknowledges that the processing and smelting costs are to be paid by ITI." (Exhibit "D" to the Answer, Counterclaim and Third Party Complaint.)

5. A similar three-way agreement between Petitioners, ITI and D & D (who contracted to excavate the ore and to deliver it to B & W) dated June 14, 1979, contains language recognizing the B & W agreement of May 25, 1979 and that B & W is to "process the material delivered by D & D" (Exhibit "E" to the Answer, Counterclaim and Third Party Complaint).

Significance Of The
Misstatement Of Contract Terms

Respondents' Opposition, Section III (p.23), argues that the parol evidence rule does not apply to the "...(false) promise by MONROE to produce 1,000 ounces of gold per month. (Findings 3:3-10)."

This is true only if the promise is not at variance with the contractual promise. In fact, the contractual promise was: sufficient ore to produce 1,000 ounces of gold per month (with ITI bearing the expense of processing and refining, and the risk of commercial failure). Respondents and the District Court misinterpreted the contractual promise, and the Court of Appeals deemed the error irrelevant because the contract was induced by fraud. Petitioners contend that this was circular logic that prevented Petitioners from proving the contractual promise to rebut the elements or scienter and justifiable reliance, as well as prevented Petitioners from excluding the evidence of the alleged parol promise to produce gold instead of ore.

II

RESPONDENTS ARGUE FOR DISCRETION IN THE TRIAL COURT TO IMPOSE A PUNATIVE AWARD OF ATTORNEYS' FEES, UNRELATED TO PROCEDURAL COSTS, WHENEVER "BAD FAITH" IS FOUND TO HAVE EXISTED, IN ADDITION TO COMPENSATORY DAMAGES FOR THE SAME ACTS

This argument is mirrored in the Memorandum Decision of the Court of Appeals. It explains the

dual reference of the Memorandum Opinion to "misleading business dealings" before suit; and "evasive conduct at trial" as the basis for the general finding of "bad faith". As such, it creates a new exception to the American Rule.

A. Hall vs. Cole Does Not Condone Such Unlimited Power To Impose Attorneys' Fees On The Loser In A Fraud Case.

Hall vs. Cole, 413 U.S. 1 (1973), was a LMRDA case - not fraud. The award of fees was not punative, but was grounded upon "common benefit". Finally, the Court held that, while "'bad faith' is essential to 'fee-shifting' under a 'punishment' rationale", it was unnecessary under a "common benefit" rationale.

The opinion in Hall vs. Cole, supra, described a truism regarding when "bad faith" could be found in the course of a defendants' conduct:

> "It is clear, however, that "bad faith" may be found, not only in actions that led to the lawsuit, but also in the conduct of litigation."

However, it is apparent the Court referred to two different types of circumstances, which yield differing consequences:

1. Bad faith before suit in obdurately refusing to assume clear liability, forcing plaintiffs to sue. Vaughn vs. Atkinson, 369 US 527, 8 LEd 2d 88, 82 SCt 997, reh den 370 US 965, 8 LEd 2d 834, 82 SCt 1578; Bell vs. School Board, 321 F2d 494 (4th Cir. 1963); Rolax vs. Atlantic Coast Railroad, 186 F2d 473 (4th Cir. 1951), and

2. Procedural bad faith during litigation including dilatory action and maintaining a meritless defense. Browning Debenture Holders Committee vs. Dasa Corp., 560 F2d 1078, 1089 (CA-2 1977); Nemeroff vs. Abelson, 704 F2d 652 (2nd Cir. 1983); Lipsig v. Nat'l Student Marketing Corp., 663 F2d 178 (DC Cir. 1980).

B. The Courts Below Based Bad Faith On The Torts For Which They Awarded Compensatory Damages.

Unfortunately, the Court of Appeals was misled and used this general description as a warrant to find bad faith in the fraudulent actions which gave rise to the damages for fraud and, which are by definition, done in "bad faith". Thus, Respondents and the Court of Appeals would have the award of attorney fees automatically

within the trial judge's discretion, in every fraud case, as well as other torts which stem from bad faith: a new departure from the American Rule.

This is not the law enunciated in Hall vs. Cole, supra, or any other decision of the Supreme Court.

C. Assessing Fees For Defending Colorably Against Fraud Is Tantamount To Including Them In Compensatory Damages By Another Name, Where Punative Damages Were Denied.

The question also arises from the Opinion of the Court below and Respondents' argument: Can an award of attorneys' fees be granted in a fraud case which arises from a colorable defense of that fraud? Respondents concede "there is no suggestion" in the record that Petitioners' defense was without "color" (Rs. Op. p22). Therefore, they seem to argue that not only can "fee-shifting bad faith" exist as a state of mind during the commission of fraud that is, somehow, divorced from (and presumably worse than) fraudulent intent, but that fee-shifting bad faith may exist during a defense of fraud, that is colorable. The tort-feaser's knowledge of his

fraudulent intent must be proven to obtain judgment. Yet, when this has been done, his refusal to have admitted guilt (absent which, his defense would be meritless) necessarily blackens him with "vindicativeness, obduracy or male fides" (Rs. Op. p22).

They postulate a tort-feaser who must be proven to have knowingly, and with intent to deceive, made fraudulent representations and ommissions sufficient to justify damages for fraud, who does not admit that knowledge, "colorably"; nevertheless, who somehow can avoid the "vindictiveness, obduracy or male fides" in his defense which justifies an additional award of attorneys' fees. All this being different than procedural bad faith where the measure of fees awarded is related to the procedural cost attributable to the bad faith or meritless defense, and different from punative damages (which were not awarded in this case, though prayed for). Such unlimited discretion in the trial court, if left unchanged, would bring about

the evil of chilling vigorous defense, and render meaningless one of the primary rationales for the American Rule.

III

THE NOTION OF ESSENTIALLY UNLIMITED DISCRETION VESTED IN THE TRIAL COURT TO AWARD ATTORNEY FEES AGAINST DEFENDANTS, IN ADDITION TO COMPENSATORY DAMAGES, FOR THE SAME BAD FAITH ACTS BEFORE LITIGATION, IS NOT FOLLOWED IN OTHER CIRCUITS

A. The Courts Below Attempt To Expand "Bad Faith" To The Point It Is Indistinguishable From Punative Or Additional Compensatory Damage.

The Court of Appeals' approach in this case amounts to nothing less than a back door attempt to redress the problem of modern litigation where the cost of pursuing the remedy renders the victory hollow. It is an attempt to expand the discretion of the trial court to award fees for "bad faith" to a point that such awards will be indistinquishable - except for legal imprecations like "bad faith" - from punative damages, or compensatory damages in cases of fraud. There are many excellent arguments that have been advanced for permiting this (see, e.g.: Kuentzel, The Attorney Fee: Why Not a Cost of Litigation?, 49

Iowa L.Rev. 75 [1963]). However, these arguments were addressed in Alyeska Pipeline Services Co. vs. Wilderness Society, 421 US 240, 247, 95 SCt 1672, 1616 (1975), and found insufficient to change the American Rule.

Here, the Court of Appeals and Respondents attempt, by expanding the "bad faith" exception, to do what this Court has not permitted in a line of cases stretching back almost 200 years; what Congress, the Supreme Court and Legislature of California have declined, as yet, to do.

They seek to establish a fee-shifting bad faith that is somehow divorced from the bad faith that is inherent in fraud; a state of mind worse than fraudulent intent to deceive, yet not quite so bad as to deserve an award of punative damages. By partially grounding the award on "fraudulent and misleading behaviour in his business dealings with plaintiff", the Court below forthrightly advances a new exception. Since the amount of the fees awarded is unrelated to the misconduct in trial, the Court of Appeals clearly has set itself

to the task of punishing tort-feasors who commit their torts with a "fee-shifting bad faith" or detering those who persevere in this state of mind to a discernible degree into the litigation.

B. This Case Presents Squarely The Issue Of The Limits Of Discretion Of The Trial Court With Reference To Bad Faith In Tort Cases.

There is no common benefit, private attorney general, or contractual rationale here. Nor is there a statutory rationale, except Section 18 of the Securities Exchange Act of 1934, 15 USC § 78r, which did not, and could not, properly, have formed the basis for the award, as was argued in the Petition (and is all but conceded by Respondents' Opposition (p17). Unless Petitioners' defense was meritless, the provisions of Section 10 of the Securities Act of 1933 (15 USC 77ic(e)) do not apply.

C. Cases Cited By Respondents Conflict With The Ninth Circuit Or Do Not Support It.

In determining the congruity with the Ninth Circuit of the cases cited by Respondents, three primary variables must be considered: 1) Were fees awarded against an unsuccessful plaintiff or

an unsuccessful defendant; 2) did the conduct which gave rise to the compensatory damages also give rise to the fee-shifting bad faith; 3) Did the amount of the fees awarded bear any relation to the cost to the other litigant of the bad faith?

While the cases cited may use similar language and rely upon similar authority, the factual variables above are determinative of the legal principles employed. None, in fact, support the bare assertion of Respondents or the Courts below that all attorneys' fees may be shifted for conduct of the kind found in this case.

For example, in Perichak vs. Int'l Union of Elec. Radio, 715 F2d 78 (3d Cir. 1983), the Court found that the lies the plaintiff told in prosecuting his wage claim amounted to bad faith and, that in the absence of mitigation, would justify - even mandate - an award of fees. However the Court emphasized that he "...could not have commenced his action except in 'bad faith', nor could he have maintained this action with any

reasonable prospect of prevailing on the merits" (715 F2d at p83). Thus, it was the filing of a meritless complaint which invoked the Court's jurisdiction to award fees against the plaintiff.

Perichak, supra, is also not congruent with this case in that, here, there was an award against all defendants, none of whom were directly found to be lying, nor specifically found to have acted in bad faith (except by their torts) by the District Court, and against whom compensatory damages were awarded - but not punative damages - for the same "misleading" business dealings that the Court found to constitute bad faith. Finally, Perichak, supra, did not deal with the amount or basis of a specific fee award.

In McCandless vs. Great Atlantic & Pacific Tea Co., Inc., 697 F2d 198 (7th Cir. 1983), there was again a plaintiff who commenced a groundless case, and the award was against the plaintiff's attorney who further abused the judicial process. The Court found an award of 1/6th of defendant's legal fees proper "...to punish errant counsel and

compensate the prevailing party for unnecessary expenses" (697 F2d at p202).

Nemeroff vs. Abelson, supra again involved a plaintiff who continued an action in a dilatory manner, after finding no basis for it in discovery. The standard set to determine the amount of fees was in Nemeroff vs. Abelson I, 620 F2d 351 (2nd Cir. 1980) and was defendants' "...reasonable expenses resulting from the bad faith conduct" (620 F2d at p351).

Lipsig vs. Nat'l Student Marketing Corp., supra, was an award of fees for dilatory discovery and courtroom tactics which were meticulously detailed in the reported opinion of the trial court (78 FRD 729-731). It held that, while defendant's filing of a counterclaim which had merit "...may well negate any notion of bad faith in filing, it certainly cannot justify abuse of the judicial process in the **methodology** of its **prosecution**" (underline emphasis added [663 F2d at p182]).

Cornwell vs. Robinson, 654 F2d 685 (10th Cir. 1981) reversed an award of $6,000 fees against a defendant for a frivolous removal petition where the trial judge's interpretation of bad faith was not equated with "...vexatious, wanton or oppressive" behaviour. The court held that more than a weak or legally inadquate case must be shown.

CONCLUSION

After Alyeska, supra, Congress responded to a perceived need to shift fees in certain cases. As Mr. Justice Brennan put it in his opinion in Hensley vs. Eckerhart, ___US___, 103 S.Ct 1933, 76 LEd 2d 240 (1983):

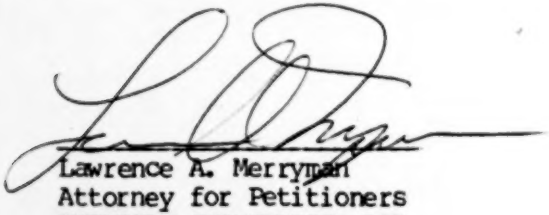
> "Congress, however, has full authority to make those decisions and it responded to the challenge of Alyeska by doing the 'picking and choosing' itself."

Into this constitutionally developed body of law, the decision of the Court of Appeals for the Ninth Circuit injects a note of discord, which, if not corrected, can expand "fee-shifting bad faith" into an unsanctioned and unlimited departure from the American Rule.

To the litigant, it is immaterial whether or not the Courts have inherent power to shift fees as they see fit; so long as in practice, fees are not generally shifted in tort cases, except in accordance with statutes or very limited historical precedents, there will remain a fundamental distinction between the American and English system. It is to preserve the pragmatic basis of that distinction that a Writ of Certiorari should issue to review the judgment and decision of the Ninth Circuit Court of Appeals.

DATED this 13th day of January, 1984.

Respectfully submitted,



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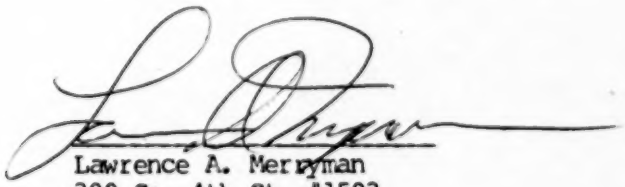
AMERICAN INDUSTRIES, LTD.
SAVAHAI, INC. and
ZACK C. MONROE

CERTIFICATE OF SERVICE

State of Nevada)
) ss.
County of Clark)

I hereby certify that on this 16 day of January, 1984, three copies of the Reply of Petitioners on Writ of Certiorari were mailed, postage prepaid, to Martin Quinn, ROGERS, JOSEPH, O'DONNELL & QUINN, 505 Sansome Street, 14th Floor, San Francisco, California 94111, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Executed on January 16, 1984 at Las Vegas, Nevada.



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